SUPREME COURT, U. S.
73-1070
JAN 8
MICHAEL RODAK, JR.

NO. ~~A-475~~

IN THE

Supreme Court of the United States

October Term, 1973

~~UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, BOWMAN TRANSPORTATION, INC., JOHNSON MOTOR LINES, INC.~~; RED BALL MOTOR FREIGHT, INC.; ~~and LORCH-WESTWAY CORPORATION, ET AL.~~, *Appellants*

v.

ARKANSAS-BEST FREIGHT SYSTEM, INC., ET AL., *Appellees*

On Appeal From The United States District Court For The Western District of Arkansas, Fort Smith Division

JURISDICTIONAL STATEMENT

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INDEX

	Page
OPINIONS BELOW	1
JURSDICTION	2
QUESTION PRESENTED	2
STATUTES INVOLVED	3
STATEMENT	3
THE QUESTION IS SUBSTANTIAL	6
CONCLUSION	20
APPENDIX A	A1
APPENDIX B	B1

CITATIONS

CASES

	Page
Arkansas-Best Freight System, Inc. v. United States, 350 F. Supp. 539 (1972)	5
Arkansas-Best Freight System, Inc. v. United States, 364 F. Supp. 1239 (1973)	1
Ayrshire Collieries Corp. v. United States, 331 U.S. 132, 67 S. Ct. 1168, 91 L.Ed. 1391 (1947)	19
Chicopee Manufacturing Corp. v. Kendall Company, 288 F.2d 719 (4th Cir., 1961)	8
Consolo v. Federal Maritime Commission, 383 U.S. 607, 86 S. Ct. 1018, 16 L.Ed. 2131 (1966)	16
Featherstone v. Barash, 345 F.2d 246 (10th Cir., 1965)	8
Federal Communication Commission v. Allentown Broadcasting Corp., 349 U.S. 358, 75 S. Ct. 855, 99 L.Ed. 1147 (1955)	16
Illinois Central R.R. v. Norfolk & Co. Ry., 385 U.S. 57, 87 S. Ct. 255, 17 L.Ed. 2162 (1966)	16
Industrial Building Materials, Inc. v. Interchemical Corporation, 437 F.2d 1336 (9th Cir., 1970)	8
In Res Las Colinas, Inc., 426 F.2d 1005 (1st Cir., 1970)	8
Jones Truck Lines, Inc. Extension-Atlanta, Georgia, 117 MCC 586	6
Louis Dreyfus & Cie. v. Panama Canal Company, 298 F.2d 733 (5th Cir., 1962)	8
Roberts v. Ross, 344 F.2d 747 (3rd Cir., 1965)	8
United States v. Forness, 125 F.2d 928 (2nd Cir., 1942)	8
United States v. Howard, 360 F.2d 373 (3rd Cir., 1966)	8
United States v. Pierce Auto Freight Lines, Inc., 327 U.S. 515, 66 S. Ct. 687, 90 L.Ed. 821 (1946)	16, 17
Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 71 S. Ct. 456, 95 L.Ed. 456 (1951)	16

STATUTES:

28 U.S.C. 1253	2
28 U.S.C. 2325	19

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinions of the district court below, dated September 11, 1973 and October 4, 1973, are reproduced in the Joint Appendix to Jurisdictional Statement of the appellants, Bowman Transportation, Inc., Johnson Motor Lines, Inc., Red Ball Motor Freight, Inc. and Lorch-Westway Corporation, et al. (J. A., Apps, J & L). The opinions are reported in *Arkansas-Best Freight System, Inc. v. United States*, 364 F. Supp. 1239 (1973).

The report and order of the Interstate Commerce Commission, Division One (J.A., App. B) is reported at 114 MCC 571. The order of the Commission Division One acting as Appellate Division overruling petition for further hearing and reconsideration (J.A., App. C) and the order of the Commission stating that no issue of general transportation importance is involved (Appendix B to this Jurisdictional Statement) are not reported in a printed decision.

JURISDICTION

The judgment of the three-judge court was entered September 11, 1973 (J.A., App. J). Notice of appeal was filed by Johnson Motor Lines, Inc. on September 27, 1973 (J.A., App. P); notice of appeal was filed by Bowman Transportation, Inc. on October 2, 1973 and October 19, 1973 (J.A., App. N); notice of appeal was filed by Red Ball Motor Freight, Inc. on October 10, 1973 (J.A., App. O); notice of appeal by Lorch-Westway Corp., et al, was filed on November 5, 1973 (J.A., App. M); and notice of appeal was filed by the United States of America and the Interstate Commerce Commission on November 9, 1973 (J.A., App. Q). On November 13, 1973 Mr. Justice Blackmun extended the time for docketing appeals to and including January 8, 1974 (J.A., App. T). The jurisdiction of this Court is conferred by 28 U.S.C. 1253.

QUESTION PRESENTED

Whether the three-judge court, in setting aside the administrative agency decision, abdicated or abandoned its judicial function by (1) adopting verbatim the proposed findings of fact and conclusions of law submitted by plaintiffs; (2) failing to examine or consider the record

made before the adminstrative agency and on file with the Court; (3) failing to give independent judicial consideration and review to the separate grants of authority to the intervening defendant motor carriers; (4) changing the decisional relationship between the agency and its examiners contrary to law; (5) rejecting Supreme Court precedent limiting the Court's scope of review and thereby substituting its judgment for that of the agency charged with the responsibility therefor; and (6) failing to comply with the jurisdictional requirement of the full three-judge court hearing and determining the case on its merits.

STATUTES INVOLVED

The Joint Appendix of appellants contains a listing of the statutes involved in this case (J.A., App. A).

STATEMENT

On May 17, 1965, Red Ball filed an application with the Interstate Commerce Commission seeking authority to extend its existing regular route motor carrier operations into Greenville, Mississippi, Birmingham, Alabama and Atlanta, Georgia. Red Ball proposed to coordinate the service at Greenville, Atlanta and Birmingham with that presently provided to as to perform a single-line motor carrier service between Atlanta and Birmingham, on the one hand, and, on the other, in excess of 1,400 cities, towns and villages served by Red Ball, including approximately 550 in Texas, 475 in Louisiana, and 125 in Arkansas.

At the time Red Ball filed its application, there were either pending or subsequently filed applications by other motor carriers which generally involved service in the same geographical area of the United States involved in

the Red Ball proceeding. As a result of pre-hearing conferences by the Commission, the Red Ball and nine other motor carrier applications were assigned for hearing. The examiners consolidated the applications in order to have one record and between March, 1966 and August, 1967, conducted 149 days of hearing at various cities and heard testimony from some 1,016 witnesses, including 933 shippers or receivers of freight appearing in support of one or more of the applications under consideration. In support of its application, Red Ball presented 130 supporting public witnesses; 23 additional public witnesses specifically supported the Red Ball application. The record before the Commission contains 23,423 pages of transcribed testimony and 1,989 exhibits.

Twenty-seven months after the close of the hearing, the examiners issued the initial administrative decision in the proceeding and recommended to the Commission that all ten of the applications be denied.

Exceptions by eight of the ten applicants and replies by opposing carriers were filed. Forty-one companies which appeared at the hearings in support of Johnson intervened and filed exceptions with the Commission. On January 24, 1972 Division One of the Commission served its order which found, contrary to the examiners' recommendation, that the record in its entirety established a public demand and need for additional motor carrier services to the extent granted (J.A., App. B, pp. 599 and 600). Division One then determined the quantum of additional service necessary and found that, on a comparative basis, of the four applicants domiciled in the Southwest, Red Ball had made a superior showing with respect to each of the criteria traditionally used by the Commission in choosing from among multiple applicants for similar authority (J.A., App. B, pp. 601-604).

Division One also found that the applications of two southern domiciled carriers, Johnson and Bowman, should be granted.

Opposing carriers filed petitions for reconsideration to the Order of Division One and Red Ball replied. By Order served September 6, 1972, Division One of the Commission, acting as an Appellate Division, overruled the petitions for reconsideration and further hearing (J.A., App. C).

Opposing motor carriers filed a petition with the Commission seeking a declaration that an issue of general transportation importance be declared. The entire Commission, by Order dated October 2, 1972, denied this petition (Appendix B hereto).

On October 4, 1972, some of the protestants before the Commission filed the instant action, and on that same day, United States Senior District Judge to whom the matter was presented entered an order requesting the Commission to refrain from issuing and putting into effect the certificate of public convenience and necessity to be issued to Red Ball. Appellees sought a temporary restraining order pending final determination on the merits.

Red Ball intervened as a defendant, and on November 1, 1972 hearing on the temporary restraining order was conducted before one of the members of the three-judge panel assigned to hear and determine this cause. On November 7, 1972 the Court entered its Order and Judgment granting the temporary restraining order suspending the operation of the Commission's Orders pending final disposition of the cause on the merits. *Arkansas-Best Freight System, Inc. v. United States*, 350 F.Supp. 539 (1972).

Plaintiffs filed opening briefs with the Court on February 15, 1973; defendants and intervening defendants filed

briefs by May 30, 1973; plaintiffs filed reply briefs on July 16, 1973.

On June 29, 1973 plaintiffs filed a motion for leave to supplement their complaint seeking review of an Order of the Commission in *Jones Truck Lines, Inc. Extension-Atlanta, Georgia,* 117 MCC 586. Red Ball filed a motion to dissolve the temporary restraining order and to determine plaintiffs' application for preliminary injunction. The full three-judge court was convened to hear plaintiffs' motion on July 24, 1973, and Red Ball requested consideration of its motion at the same hearing.

The Court denied plaintiffs' motion to supplement the complaint and then announced that the original cause of action would be submitted on the merits with no further oral argument by the parties (J.A., App. E). A stipulation to that effect was entered into by all parties, and the Court issued an appropriate order which also permitted all parties to file proposed findings of fact and conclusions of law.

The Court entered its judgment and opinion on September 11, 1973 and subsequently overruled a motion of the defendant United States seeking a remand of the cause to the defendant Commission. The second order and judgment of the Court overruling the motion of defendant United States to remand is dated October 19, 1973 (J.A., App. J and L).

THE QUESTION IS SUBSTANTIAL

The opinion before the Supreme Court affects the decisional process of all administrative agencies as well as the procedural due process and scope of judicial review of virtually all administrative agency decisions. The basic question presented is whether a three-judge district

court abandoned or abdicated its judicial function by adopting verbatim as its opinion the proposed findings of fact and conclusions of law submitted by the prevailing parties, plaintiffs below. The issues and questions which are of equal significance revolve around and relate to the failure of all three judges to hear and determine this case, their failure to make an independent review of the record before them, their failure to present an opinion which could be considered the product of disinterested judicial minds, and their failure to follow established precedent in reviewing the agency decision.

The opinion of the three-judge court which the Supreme Court is asked to review is believed to present the most complete abdication or abandonment of the judicial function and duty of a court that can be imagined. The only role performed by the three judges in determining the merits of this case was to receive and consider proposed findings of fact and conclusions of law submitted by the parties to select from among them and to adopt verbatim those of the plaintiffs (J.A., App. I and App. J).

In the zeal of representing a client, the interest advocate obviously prepares findings and conclusions which are, at the very least, couched in terms and presented in a light most favorable to the client. Such is the advocate's duty. The duty of the judiciary, however, is to consider all facts and contentions and to approach the decisional process with a disinterested mind. That duty is breached when, as here, the Court mechanically adopts the facts and conclusions submitted by one party while failing and refusing to discuss issues or consider facts favorable to another party or to consider the various cases as separate and independent matters raising separate and independent issues and consideration.

The circumstances here are to be distinguished from a Court's requesting submissions of findings and conclusions by all parties for the purpose of assisting the Court in making its own independent consideration and determination of the issues in a complicated controversy. This complicated controversy involves disputed legal issues arising out of a large number of facts but the opinion of the three-judge court gives no indication whatsoever of independent consideration of them. Plaintiffs' proposed findings were adopted verbatim. The submission of findings and conclusions by all parties does not and should not relieve the Court of the duty of performing its judicial function of making the findings and conclusions which are the product of the Court's own careful and disinterested consideration of the entire case.

The question of the propriety of a three-judge court's adopting verbatim the proposed findings and conclusions submitted by one of the parties to the case has not been heretofore directly before this Court. Various Circuit Courts of Appeal have discussed the question and generally condemned the practice where it resulted in depriving the parties' and the reviewing court's being given an opinion based upon the trial court's own careful consideration of the case. *United States v. Forness,* 125 F.2d 928, 942 (2nd Cir., 1942); *Chicopee Manufacturing Corp v. Kendall Company,* 288 F.2d 719, 724 (4th Cir., 1961); *Louis Dreyfus & Cie. v. Panama Canal Company,* 298 F.2d 733, 738-39 (5th Cir., 1962); *Roberts v. Ross,* 344 F.2d 747, 751-53 (3rd Cir., 1965); *Featherstone v. Barash,* 345 F.2d 246, 249 (10th Cir., 1965); *United States v. Howard,* 360 F.2d 373, 378 (3rd Cir., 1966); *In Re Las Colinas, Inc.,* 426 F.2d 1005, 1008-10 (1st Cir., 1970); *Industrial Building Materials, Inc. v. Interchemical Corporation,* 437 F.2d 1336, 1339-40 (9th Cir., 1970).

The verbatim adoption by the three-judge court of plaintiffs' proposed findings and conclusions results in counsel for plaintiffs preparing the opinion of the Court which sets forth the basis and reasons for the Court's judgment. This preparation by victorious counsel of the opinion of the Court deprived Red Ball of any independent consideration of its case by the three judges and thereby denied Red Ball due process of the law. The three-judge court held the decision of the Commission arbitrary as to all three grants of authority without giving any independent consideration to the substantial evidence supporting the multitude of findings of the Commission supporting only the grant to Red Ball. Although Red Ball urged the Court to consider the detailed findings of the Commission which supported the finding of public need for the single-line service proposed by Red Ball, the Court rejected this suggestion and adopted conclusions of law which state that the Commission's decision in the Red Ball case was arbitrary and capricious because it was based on only portions of the record and not the entire record. This Court, however, is not informed as to the portions of the record in the Red Ball case which the three-judge court believed were not considered by the Commission. The fact that several applications were combined for hearing should not deprive the separate applicants of the right of each to a determination on its own case. Consolidation for hearing purposes does not require a single order either granting or denying all applications.

The erroneous adoption by the three-judge court of the plaintiffs' proposed findings and conclusions and the resulting failure of the three-judge court to consider the applications independently and separately each from the other is compounded by the fact that the Court did not undertake to examine or consider the record made before

the Commission and filed with the Court. Attached to this Jurisidictional Statement as Appendix A is a true copy of the Affiavit of Robert L. Jones, Jr., Attorney at Law, of Fort Smith, Arkansas, which establishes that the record before the Commission was filed with the three-judge district court in Fort Smith, Arkansas and remained unopened in the basement of the Federal Building in Fort Smith, Arkansas until requested to be filed with the Supreme Court. It seems, therefore, unlikely that any one of the three judges comprising the panel required to hear and determine this cause on the entire record before the Commission ever examined any significant portion of the record made before the Commission. It is true that plaintiffs and defendants submitted to the Court abstracts of any testimony of the witnesses appearing in the proceedings before the Commission, but those summaries of the testimony comprise no more than a minute part of the record made before the Commission, and all such abstracts of testimony were prepared in connection with and submitted in support of the briefs filed by the respective parties after the close of the record and prior to the initial decision issued by the examiners. These abstracts accurately reflect a summary of the testimony of the witnesses but examination of exhibits and other matters contained in the record would be required for any true and accurate "review" of the record.

Although the Court below stated in its opinion that it considered a number of the exhibits and much of the testimony of record in the proceeding, the opinion does not reflect or specify any portions of the record other than the examiners' recommended order and the abstracts of testimony which the Court might have relied upon in concluding that plaintiffs' proposed findings and conclusions

were correct and that the Commission's decision was arbitrary and unlawful.

The Court's opinion is particularly lacking in specificity of any portion of the record which supports the conclusion that the Commission's grant of authority to Red Ball was arbitrary, unreasonable or otherwise unlawful. Plaintiffs' proposed findings and conclusions were adopted by the trial court without any change or modification and without any discussion of the contentions, positions, issues and evidence in the proceeding before the Commission. That is particularly true of the manner in which the trial court set aside the Commission's grant of authority to Red Ball. Such action by a lower court is so divergent from established administrative review as to call for close scrutiny by this Court. The mechanical adoption of plaintiffs' proposed findings and conclusions results in an opinion of the three-judge court below which does not reveal any discerning line of the decision as basis for reversal of the grant of authority to Red Ball. The failure of the Court to perform its judicial function and the failure of the Court to examine and discuss in detail those portions of the record relied upon results in an opinion with findings and conclusions as to Red Ball which are sketchy, and the Court's reasoning in concluding that the grant to Red Ball was arbitrary and unlawful is scarcely discernible.

In substance only two portions of the three-judge court's opinion speak specifically to the Red Ball proceeding (J.A. App. J., Conclusions Nos. 17 and 20). One on which plaintiffs laid great stress on in their brief and on which they relied heavily in their proposed findings and conclusions involves the Commission's reference to an industry publication concerning the closing of a terminal of one of the parties in the Commission proceeding. Plaintiffs argued in their petitions for reconsideration *before*

the Commission that the Commission did not also consider the same industry publication as showing what they referred to as "terminals" of Red Ball being closed. In its reply *at the Commission level,* Red Ball pointed out that the points which were eliminated from the industry publication were not "terminals" and that the service of Red Ball to the many hundreds of points involved in the proceeding was not affected. The three-judge court, in adopting plaintiffs' findings and conclusions, found that the Commission acted arbitrarily in referring to the industry publication concerning one of the carriers involved in the proceeding and did not consider the same publication which they alleged showed Red Ball had closed "terminals." The Court's opinion in this regard makes an erroneous finding of fact concerning this issue; the Court erred also in adopting plaintiffs' conclusions of law that the Commission's decision was unlawful (J.A. App. J., Conclusion No. 20). The pleadings of Red Ball before the Commission and the Court below established that Red Ball did not close "terminals," but the Court's opinion does not discuss these facts or contentions. Of equal error is the adoption by the Court of plaintiffs' allegations and contentions that the Commission did not "consider" the facts alleged and argued by them before the Commission. There is no proof of the validity of plaintiffs' allegations concerning what the Commission considered, and the Court below failed to distinguish plaintiffs' pleadings and argument from facts established in the record.

Assuming for the purposes of argument that plaintiffs' contentions had some validity, the opinion of the Court fails to hold that the Commission's finding that a public need for additional service exists was in error. The industry publication issue argued by plaintiffs relates to only one of the criteria considered by the Commission in its

choice of Red Ball as the superior southwestern applicant to provide the service needed and *did not* relate to the finding of the Commission that there exists a public need for the service (J.A., App. B, 602, 603).

The only other specific separate issue concerning the grant to Red Ball discussed in the Court's opinion concerns an allegation that the Commission failed to consider that Red Ball maintained tariff restrictions of a similar nature which the Commission found to be a service complaint about other carriers. The facts concerning the tariff matters were presented during hearing, were considered by the examiners, and considered by the Commission. The Court below erred in adopting as a legal conclusion the allegation of plaintiffs that the Commission "did not consider" all facts of record when the finding is in direct contradiction of the Commission's findings and there is nothing before the Court to establish otherwise (J.A., App. B, p. 575).

The Court adopted a proposed conclusion of law by plaintiffs that the Commission's grant to Red Ball and others was without any rational basis and, therefore, capricious because the Commission made no comparative analysis of the quantity of service available between the involved points (J.A., App. J, Conclusion No. 21). This is an erroneous conclusion because the Commission specifically stated that it did consider all pertinent evidence and Commission decisions and enumerated some 23 of them throughout its order. These were all called to the Court's attention in brief by Red Ball as well as the specific Commission finding in the Red Ball case that "none of the other three applicants proposes and none of the protestants (even considering the operations authorized since the hearing herein) is able to provide the exten-

sive single-line service proposed by Red Ball between Atlanta and Birmingham, on the one hand, and, on the other, the territory Red Ball now serves" (J.A., App. B, p. 603). The Court fails to discuss this specific finding that even considering the action of protesting carriers in acquiring operating rights in the geographical area of the Red Ball proceeding during the six and one-half years the Red Ball application was pending, none of those carriers was in a position to provide the single-line service between Atlanta and Birmingham and the approximate 1,400 cities, towns and villages then served by Red Ball.

Virtually all of the other findings and conclusions adopted by the Court treat the Commission's decision and the three successful applicants as an inseparable grant of authority. The failure of the Court to treat the decision of the Commission and the grant to Red Ball independent of the Johnson and Bowman grants denied Red Ball the consideration required by due process of law.

This treatment, as proposed by plaintiffs, resulted in erroneous findings and conclusions being adopted in the Red Ball proceeding. In addition to those previously enumerated, the three-judge court adopted specific erroneous findings in the Red Ball case with respect to (1) a separate, accurate description of the proposed service by Red Ball; (2) the nature of the evidence presented by Red Ball; (3) the manner in which Red Ball presented its abstract of evidence to the examiner; (4) an implication that Red Ball presented transit-time study similar to the other applicants; and (5) an inference that the service of Red Ball was shown to be inferior in some respect. There are numerous findings adopted by the Court which have no relevance to the Red Ball case and many more which infer or imply facts which do not relate to the Red Ball case. Most of the conclusions of law

other than specifically discussed above are not pertinent to the Commission's decision in the Red Ball proceeding.

Much of the error of the Court in this regard is predicated upon plaintiffs' proposed findings which urge the examiners' report and recommended order to deny all 10 applications as the order and decision the Commission should have entered. The heart of plaintiffs' case as presented in their pleadings, their brief and in their proposed findings and conclusions is that the Commission erred in reaching a different conclusion from that recommended by its examiners. The Court, by adopting the plaintiffs' proposed findings and conclusions, has changed the decisional relationship between an administrative agency and its examiners and the standards of review which the Supreme Court has established. The opinion of the Court below states that the Commission is not bound by the decision of its hearing examiners. Nevertheless, the Court says since the Commission did not specifically reject any of the findings of the examiners, the Commission is without discretion or power to reach a different conclusion based on the same findings. Plaintiffs proposed conclusions, adopted by the Court, imply a hidden or improper motive on the part of the Commission in granting the Red Ball application and, therefore, a violation and abuse of the spirit of the discretion reposed in the Commission. There is no clarification or explanation of this accusation by the Court and it should at least be disregarded if not condemned.

The plaintiffs' pleadings, briefs and proposed findings and conclusions charge the Commission with improperly according weight to certain evidence. The three-judge court has held the Commission acted unlawfully in reaching a different conclusion from the examiners without rejecting that part of the evidence not in support of the

Commission's conclusion (J.A., App. J, Conclusion No. 24). This is an erroneous conclusion of law under the opinions of the Supreme Court. *United States v. Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 535-36, 66 S. Ct. 687, 698, 90 L.Ed. 821 (1946); and *Illinois Central R.R. v. Norfolk & Co. Ry.*, 385 U.S. 57, 66, 69, 87 S. Ct. 255, 17 L.Ed. 2162 (1966). *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 493, 71 S. Ct. 456, 95 L.Ed. 456 (1951); *Federal Communication Commission v. Allentown Broadcasting Corp.*, 349 U.S. 358, 364-65, 75 S. Ct. 855, 99 L.Ed. 1147 (1955).

The effect of the Court's determination to adopt plaintiffs; findings and conclusions is to seize unto itself and, indirectly, plaintiffs, the power to determine public convenience and necessity in the Red Ball proceeding. The opinion acknowledges the Court's limited scope of review but then holds that if the Commission's action is merely alleged to be arbitrary, capricious, and an abuse of discretion, then a review on standards established by this Court to be applicable to administrative proceedings is to be abandoned. This conclusion is erroneous. *Consolo v. Federal Maritime Commission*, 383 U.S. 607, 86 S. Ct. 1018, 16 L.Ed. 2131 (1966).

The lower Court then finds that the conclusion of the Commission that the public interest required additional motor carrier service was not consistent with the findings of the examiners. The Court failed to consider or discuss the fact that the examiners approached their consideration of public convenience and necessity on the basis of either granting or denying all 10 applications rather than on the basis of questions as to whether any individual applicant had demonstrated a need for its proposed service. Red Ball complained of the examiners' approach in its excep-

tions. The Commission reviewed the entire record as well as matters that had occurred subsequent to the close of the hearing and concluded that there was a public need established for additional service (J.A., App. B, p. 599). The Commission then considered the quantum of service necessary to fulfill the demonstrated need and concluded that Red Ball should be one carrier granted authority. The findings of the Commission are detailed in its order, were specifically presented to the Court in brief, but were summarily rejected by the Court because in its judgment the findings of the examiners were more correct, thus making the Commission's decision arbitrary and capricious. The Court thus, patently exceeded its limited function on review. It is beyond the reviewing Court's function to choose between the examiners' report and the Commission's order or to hold the Commission's order unlawful because the Court feels the proper result was not reached. *United States v. Pierce Auto Freight Lines, Inc., supra.*

The Court's opinion holds there is no rational basis for the Commission's decision to accord less weight to certain evidence introduced by protesting carriers than to the transit studies introduced by public witnesses (J.A., App. J., Conclusion Nos. 12 and 17). In effect, the three-judge court has re-weighed or weighed again the evidence and tipped the scales in favor of the examiners. That also exceeds the Court's function on review. As to the rationality of the Commission's weight of the evidence, the reasons for its decision are detailed in its report (J.A., App. B, p. 596 and 599). The Commission did not "reject" protestants' traffic study as found by the three-judge court but considered all of them and concluded that for the reasons stated found they were entitled to less weight than the studies of the public witnesses (J.A., App. B, p. 599).

Each of the conclusions of the three-judge court that the Commission's treatment of applicants' and protestants' traffic studies was arbitrary and without rational basis is not pertinent to and serves no basis for concluding the Commission's grant to Red Ball was in error because Red Ball introduced no traffic studies as an applicant.

The three-judge court, by adopting plaintiffs' proposed findings and conclusions, finds repeatedly that the Commission failed to consider or refused to consider certain evidence in the record or facts alleged by plaintiffs to exist although outside the record. The Commission's order shows conclusively that this finding in numerous instances is erroneous. These allegations were specifically noted in Red Ball's brief to the Court. Had the three-judge court considered that part of the record made up of plaintiffs' pleadings before the Commission including (1) initial briefs, (2) replies to exceptions, (3) petitions for reconsideration to the Division One order; and/or (4) petitions seeking a declaration of an issue of general transportation importance, the Court could not have adopted these findings concerning lack of consideration by the Commission. All of the matters which plaintiffs allege were not considered by the Commission were presented to the Commission by them in one or more of the foregoing pleadings and replies thereto were made by Red Ball insofar as pertinent to its proceeding. Plaintiffs' argument goes to the weight given evidence by the Commission, and there is no basis to find as a fact that the Commissioners did not consider the evidence. In the absence of that fact, the conclusions of law that for that reason the Commission's action was arbitrary or an abuse of its discretion is also in error.

The three-judge court did not hear argument on the merits of this case. It is true that the parties stipulated

that nothing could be added by argument that was not contained in the various briefs, but a review of the transcript of the hearing on plaintiffs' motion to supplement their complaint demonstrates that the Court was not disposed to hear oral argument (J.A., App. E). Plaintiffs will obviously argue that oral argument was waived, but hearing and determining this case as a three-judge court is a jurisdictional requirement and cannot be waived. The three judges must fully perform their functions. *Ayrshire Collieries Corp. v. United States*, 331 U.S. 132, 67 S.Ct. 1168, 91 L.Ed. 1391 (1947).

Only one judge heard any argument concerning the Red Ball case and that was on a hearing for temporary restraining order. The matter before the three-judge court was plaintiffs' motion to supplement their pleadings to join another carrier in the action. The argument before the three-judge court dealt with that motion and not the merits of the Red Ball case. The single judge who decided the temporary restraining order felt that the case was "pretty thoroughly argued", but the issues are different and the other two judges were not present at that argument.

If the matter of argument can be dispensed with, then it is even more incumbent on the three-judge court to consider and discuss the contentions and position of the parties as set out in pleadings and briefs, to review the entire record and to prepare an opinion which is the product of the judges' own disinterested judicial expertise. The mechanical adoption of plaintiffs' findings and conclusions by the three-judge court deprived Red Ball of its rights under 28 U.S.C. 2325 to have the review of the Commission's grant of authority to it heard and determined by the full three-judge court.

CONCLUSION

For the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,

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January 1974

CERTIFICATE OF SERVICE

I certify that three copies of this jurisdictional statement have been served on each party separately represented in the proceeding by depositing the same in the United States Post Office at Austin, Texas, with first class postage prepaid, addressed to counsel of record at his post office address or with Air Mail postage prepaid where counsel resides 500 miles or more from Austin, Texas and three copies have been served on the Solicitor General, Department of Justice, Washington, D.C., 20503 and the Interstate Commerce Commission, Washington, D.C. 20423 in the same manner.

Dated at Austin, Texas this 7th day of January, 1974.

JERRY PRESTRIDGE

APPENDIX A

AFFIDAVIT OF ROBERT L. JONES, JR.

STATE OF ARKANSAS §
§
COUNTY OF SEBASTIAN §

My name is Robert L. Jones, Jr. I am fifty-one (51) years of age. I have been actively engaged in the private practice of law in the City of Fort Smith, Arkansas, continuously since September of 1948 (with the exception of 21 months in 1950-52 when I served on active duty in the Judge Advocate General Corps of the United States Army). I am admitted to practice before the Arkansas Supreme Court, the United States District Court for the Western District of Arkansas, the United States Court of Appeals for the Eighth Circuit and the Supreme Court of the United States. I am local counsel in Fort Smith, Arkansas, for Johnson Motor Lines, Inc., Bowman Transportation, Inc., and Lorch-Westway Corporation, et al, intervening shippers in the case in the United States District Court for the Western District of Arkansas, Fort Smith Division, styled "Arkansas-Best Freight System, Inc., et al vs United States of America and Interstate Commerce Commission, et al, No. FS-72-C-65".

On November 12, 1973, at the request of co-counsel for the named clients, I went to the office of the Clerk of the United States District Court, Western District of Arkansas, Fort Smith Division, for the purpose of conferring with the Clerk concerning matters related to the preparation and transmittal of the record to the Supreme Court of the United States in connection with the appeal from the judgment of this Court entered September 11, 1973, and the order of this Court entered October 4, 1973. The Clerk, Honorable E. A. Riddle, specifically

requested instructions with reference to transmittal of the record of the proceedings before the Interstate Commerce Commission, which he stated was stored in boxes in the basement of the Federal Building (the Clerk's office is on the third and top floor of the building). I accompanied Mr. Riddle to the basement to a store room which was locked and we gained entrance by a key in the possession of Mr. Riddle. Mr. Riddle pointed out to me four (4) boxes, size approximately two and a half feet in height by two and a half feet in width and two feet in depth, which had been stamped filed on May 23, 1973 on the outside of the boxes by Mr. Riddle's office. Mr. Riddle informed me that the boxes containing the record of the proceedings before the Interstate Commerce Commission, upon receipt by his office, were stored in this store room and to his knowledge had been in the store room continuously since receipt. A more detailed inspection of the boxes revealed that three out of the four large boxes had been opened and each large box contained two or more smaller boxes. These smaller boxes did not appear to have been opened. I instructed Mr. Riddle to have the four larger boxes with content undisturbed crated into one large container and shipped to the Clerk of the Supreme Court of the United States.

Further affiiant sayeth not.

ROBERT L. JONES, JR.
Robert L. Jones, Jr.

Subscribed and sworn to before me, this 16th day of November, 1973.

MARY E. BURROWS
Notary Public

My Commission Expires:
April 26, 1977.

(SEAL)

APPENDIX B

No. MC-1124 (Sub-No. 206)

No. MC-106401 (Sub-No. 18)

JOHNSON MOTOR LINES, INC., EXTENSION-
DALLAS, TEXAS
(Charlotte, N. C.)

No. MC-111231 (Sub-No. 67)

JONES TRUCK LINES, INC., EXTENSION-
ATLANTA, GEORGIA
(Springdale, Arkansas)

Upon consideration of the consolidated record in the above-entitled proceedings, and of:

(1) Joint petition of East Texas Motor Freight Lines, Inc., Mercury Freight Lines, Inc., Roadway Express, Inc., and Roadway Express, Inc., of Miss., protestants, filed September 20, 1972, for a determination and announcement that the proceedings involve an issue of general transportation importance;

(2) Joint petition of Campbell Sixty-Six Express, Inc., ET&WNC Transportation Company, Gordons Transports, Inc., and Red Line Transfer & Storage Company, Inc., protestants filed September 21, 1972, for a determination and announcement that the proceedings involve an issue of general transportation importance;

(3) Joint petition of Transcom Lines, T.I.M.E.-DC, Inc., Consolidated Freightways, Yellow Freight System, Inc., and Holloway Motor Express, Inc.,

protestants, filed September 21, 1972, for a determination and announcement that the proceedings involve an issue of general transportation importance;

(4) Petition of applicant in No. MC-76177 (Sub-No. 304), filed September 21, 1972, for a determination and announcement that the proceedings involve an issue of general transportation importance;

and good cause appearing therefor:

It is ordered, That the pleadings to the extent they relate to No. MC-111231 (Sub-No. 67), be, and they are hereby, rejected, as inappropriate.

It is further ordered, That the petitions in all other respects be, and they are hereby, denied, for the reason that, in the judgment of the Commission, no issue of general transportation importance is involved.

By the Commission.

ROBERT L. OSWALD,
Secretary.

(SEAL)